Supreme Court, U.S.
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No. 00-1233

In The

Supreme Court of the United States

GALEN HARDIN, JOHAN KLEHS, DEAN ANDAL, ERNEST J. DRONENBURG, JR., and JOHN CHIANG,

Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS and AGUA CALIENTE TRIBAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. The Eleventh Amendment to the United States Constitution jurisdictionally bars suits by Indian tribes against States in federal court. *Ex Parte Young*, 209 U.S. 123 (1908), allows as an exception to the Eleventh Amendment the equitable remedy of seeking prospective injunctive or declaratory relief against state officials. An equitable remedy is not available when there is an adequate remedy at law. Is a suit for tax refund in state court an adequate remedy at law so as to bar equitable relief in federal court against state officials concerning a state tax assessment?

2. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, (1997), held that the *Ex Parte Young* exception to the Eleventh Amendment is not available in core areas of state sovereignty. In conflict with the Ninth Circuit's decision in the present case, a panel of the Tenth Circuit has held that state taxation is a core area of state sovereignty as described in *Coeur d'Alene*. Should this conflict in the circuits be resolved by this Court's determining that state taxation is a core area of state sovereignty that renders the *Ex Parte Young* exception unavailable?

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STATEMENT OF THE CASE

Far from presenting novel questions of federalism worthy of this Court's review, this is a garden-variety tax dispute between a federally-recognized Indian tribe and a state regarding the tribe's sales of food and beverages at a hotel owned and operated directly by the tribe itself on its own federal Indian reservation. There are no complicating factors, such as a non-Indian lessee or manager.

The Tribe's hotel is located on land that has been held in trust for the Tribe, the Agua Caliente Band of Cahuilla Indians (the "Tribe") as part of the Agua Caliente Indian Reservation since its establishment in 1876. [Pet. App. 32, no. l] The non-Indian patrons consume their purchases entirely on the reservation. [Pet. App. 34, no. q] The hotel provides substantial employment for Tribal members [Pet. App. 37-38, no. aa] and more than offsets the costs of whatever municipal services are provided to it by significant voluntary Tribal payments in lieu of standard non-sales taxes. [Pet. App. 35, no. v] The Tribe borrowed $8,750,000 to acquire the hotel. [Pet. App. 32, no. n] The loan is 90% guaranteed by the United States [*Id.*]. The District Court found that the Tribe's hotel would fail and this loan would go into default if the Tribe fails to pay the state sales taxes in question, thereby causing the suspension of the Tribe's liquor license, which is otherwise in good standing. [Pet. App. 39, no. ee]

This Court has developed a clear analytical framework for the resolution of such issues, which this Court describes as "a *per se* rule". *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987); and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-483

(1976). The pivotal point in the analysis is whether the tribe is merely marketing a tax exemption for sales of items not of reservation-based value, or

> the Tribes are not merely importing a product onto the reservation for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities . . . Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.
>
> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-220 (1987)

Thus, the only feature of interest in this case is the procedural means by which the underlying tax dispute is resolved. The Tribe initiated the litigation in federal district court under 28 U.S.C. § 1362, naming as defendants the relevant state tax officials in their official capacities on the theory of *Ex Parte Young*, 209 U.S. 123 (1908). [Pet. App. 25, no. 1] This is the format in which dozens of such tax disputes between Indian tribes and individual state tax officials or agencies have been presented to the federal courts over a period of decades. See, e.g., *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995); *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v.*

Bracker, 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685 (1965); and *The Kansas Indians*, 5 Wall. 737 (1867).

When the Petitioners (hereinafter, the "State Officials") assert that the Tribe must pay the disputed tax, thereby causing its hotel to fail and its above loan to go into default, and then sue for a refund in state court, they ignore this massive body of cases which allow tribes access to federal court under 28 U.S.C. § 1362 for just such disputes. No federal court has ever required a tribe to pay a ruinous state tax and then litigate the exclusively and peculiarly federal question of its validity *as a matter of federal law* in state court. The Court of Appeals recognized the quintessentially federal nature of such a tribal-state tax dispute and followed the body of federal law which routinely resolves such disputes in federal court. The State Officials provide no support for their novel assertion that the mere existence of an alternate state court remedy now necessarily deprives the Tribe of the same access to federal court that other tribes have enjoyed for over a century on such tax issues. Therefore, the assertion of the State Officials, that the existence of a state forum bars the federal jurisdiction that otherwise exists, presents no significant federal question for review by this Court.

As for the availability of purely prospective declaratory and injunctive relief against the State Officials, this Court has acted in two ways as recently as February 21, 2001 to foreclose this argument.

First, as will be noted in detail below, a five-Justice majority of this Court has held in *Board of Trustees of the University of Alabama v. Garrett*, ___ U.S. ___, No. 99-1240, February 21, 2001, Slip Op., p. 16, n. 9, that such prospective injunctive relief is certainly still available generally against individual state officials under *Ex parte Young*.

Second, with regard to the claim that matters involving state taxation *necessarily* invade a core area of state sovereignty under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) and thus preclude use of *Ex parte Young*, this Court on February 21, 2001 also denied certiorari to review just this issue in *Sac & Fox Nation of Missouri v. Pierce*, No. 00-599, and *Pierce v. Sac & Fox Nation of Missouri*, No. 00-556. As will be noted below, this claim was squarely presented in *Pierce*, No. 00-556, where this Court denied review. There is no greater need to grant review of the same issue now.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS VERY RECENTLY DENIED REVIEW OF THE *EX PARTE YOUNG* ISSUE.

Issue no. 3 for which review was sought in the petition for certiorari in *Pierce v. Sac & Fox Nation of Missouri*, No. 00-599, was stated to be:

> 3. Whether the Ex Parte Young doctrine applies when an Indian Tribe challenges a general state tax.
>
> Petition for Writ of Certiorari, No. 00-599, p. i

This very issue was the subject of a reported opinion in the District Court. See *Sac & Fox Nation of Missouri v. Lafaver*, 979 F.Supp. 1350, 1353-1354 (D. Kansas, 1997). The Tenth Circuit considered this issue, but found it unnecessary to reach this issue because it found jurisdiction without the necessity for the *Ex parte Young* fiction. See *Sax & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 573, n. 3 (10th Cir., 2000).

Despite the directness with which the *Ex parte Young* issue was raised in *Sac & Fox*, this Court denied certiorari on February 21, 2001. This should come as no surprise, because on the very same day a five-Justice majority of this Court also held that Title I of the Americans with Disabilities Act "can be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908)." *Board of Trustees of the University of Alabama v. Garrett*, ___ U.S. ___, ___, No. 99-1240, Slip. Op., p. 16, n. 9 (February 21, 2001). Thus, it is clear that this Court sees no need to revisit the general doctrine of *Ex parte Young*, despite the State Officials' reading of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) to the contrary in both cases.

The only possible issue regarding the applicability of *Ex parte Young* that might remain regards the claim that there is a core area of state sovereignty at state in this case which, under *Idaho, supra*, might preclude the use of *Ex parte Young*. The State Officials so claim. As will be discussed in detail below, there is no conflict on this point

between the Ninth Circuit in the present case and the Tenth Circuit in *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir., 1998), *cert. den.*, 525 U.S. 1122 (1998). For present purposes, it is sufficient to note that the same state interest in taxation, whether such a core area of state sovereignty or not, *was* at state in *Sac & Fox*, and this Court declined review. Therefore, the same issue in the instant case presents no significant federal question deserving of certiorari.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

The State Officials attempt to show a conflict between the opinion of the Tenth Circuit in *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir., 1998) and the present opinion of the Ninth Circuit. In reality, there is no such conflict, for the reasons stated below.

Certainly *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) did state that the presence of a "special state sovereignty interest" can make a remedy under *Ex parte Young* unavailable even if that remedy would otherwise be available. The "special state sovereignty interest" in *Idaho* was relief which, if granted, would "block all attempts by these [State] officials to exercise jurisdiction over a substantial portion of land" and "would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.*, at 282-283.

The State Officials assert that their interest regarding taxation is such a "special state sovereignty interest." While taxation is certainly an important matter to all

States, not *every* matter concerning state taxation *automatically* rises to this level. The Tenth Circuit itself has not read *ANR Pipeline* so expansively. Therefore, if the Court will review the Tenth Circuit's treatment of *ANR Pipeline* in this regard, it will see that there is no true conflict on this point between the Tenth and Ninth Circuits.

Although often not discussing the matter in terms of a "special state sovereignty interest", the cases draw a distinction between, on the one hand, actions seeking to take funds from a state treasury, either as damages or as a refund or relief equivalent thereto, and actions seeking to control future conduct regarding funds not in the state treasury at all or those expended in violation of federal law, such as in a manner denying due process.

Ex parte Young does not authorize a claim for a *refund* of state taxes already paid and in the hands of the state. *Reich v. Collins*, 513 U.S. 106, 110 (1994). The Seventh Circuit has held that the Eleventh Amendment barred a tax-based *Ex parte Young* claim against state officials when "the request for relief would have an effect upon the state treasury that is not merely ancillary but is the essence of the relief sought." *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 293 (7th Cir., 1993). There the plaintiffs sought to require "officials of a state to take actions that constitute performance by a state of obligations that are the state's in its political capacity." *Id.*, at 294. Similarly, a district court has drawn a distinction between a request for "a declaratory judgment and a permanent injunction [regarding state taxation which] clearly fall within the pale of prospective relief [and] their request for disgorgement of illegally collected taxes." *Melof v. Hunt*, 718 F.Supp. 877, 879 (M.D.Ala., 1989).

The only cases which directly discuss whether state taxation implicates such a "special state sovereignty interest" arise in the Tenth Circuit. In *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir., 1998) the Tenth Circuit described the relief requested, "that the state of Kansas should 'recertify' its tax assessment of the pipelines' personal property in Kansas" as equally intrusive into the state's sovereignty as would be a retroactive money judgment. *Id.*, at 1194. Such action regarding a state's tax structure, while prospective in timing, is clearly just as intrusive as would be a retroactive damages award because it disrupts a tax assessment system already in place and would remedy past wrongs by a change in future conduct.

The Tenth Circuit has clarified *ANR* to draw the same distinction in holding that relief which in some way implicates the state treasure, such as by an effect on state taxation, does not *automatically* transform the case into one invading "special state sovereignty interests" so as to defeat an *Ex Parte Young* claim:

> Plaintiffs argue the relief they request will have no effect on the state treasury of New Mexico because they seek only prospective compliance with federal law. However, the prospective/retrospective analysis is often not as simple as it appears. In many instances, even prospective relief will burden the state's treasury to some degree. *Edelman*, 415 U.S. at 668, 94 S.Ct. 1347. The "overriding question" is not whether the relief will require the payment of state funds, but whether the relief will "remedy future rather than past wrongs." *Coeur d'Alene Tribe*, 42 F.3d at 1252 ("An injunction that will in practical

effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their future actions to federal law." (Internal citation omitted.))

Even though the request for relief against the state officials in this case will affect New Mexico's interest in profits under the assignment clause of the lease, the relief will have no retrospective effect. The relief Plaintiffs seek will only affect the state's right to future revenues. While this may cause difficulties for New Mexico and require additional expenditures from the state's coffers in order to effectively operate and maintain the affected recreation areas, it does not transform Plaintiffs' claim into an impermissible request for retrospective relief or damages.

Elephant Butte Irrigation District v. Department of Interior, 160 F.3d 602, 611 (10th Cir., 1998)

Elephant Butte also addresses the broader question of how great an effect a suit under *Ex parte Young* must have in order for it to be barred by a "special state sovereign interest":

After *Coeur d'Alene*, if we determine the relief Plaintiffs seek, although prospective and not tantamount to a damages award, is an excessive intrusion into an area of special state sovereign interest, *Ex Parte Young* does not apply, and the Eleventh Amendment bars the suit. *Coeur d'Alene Tribe*, 521 U.S. at ___, 117 S.Ct. at 2043. However, if the relief involves enjoining a continuing violation of federal law that would have only an incidental effect on special state sovereign interests, then federal jurisdiction is proper

under the traditional approach to *Ex Parte Young*.

> It is easy to understand how a majority of the Justices in *Coeur d'Alene Tribe* could decide that the Tribe's suit to divest the State of Idaho of all authority and ownership over submerged lands was actually a suit against the state. 521 U.S. at ___, 117 S.Ct. at 2047 (O'Connor, J. concurring). However, it is more difficult to say whether the Court intended its ruling to extend to every situation where a state property interest is at issue. We believe the holding of *Coeur d'Alene Tribe* does not extend that far, but instead reflects the extreme and unusual case in which, although the doctrine of *Ex parte Young* under traditional principles is applicable, the suit is prohibited because it involves "particular and special circumstances," *id.* at ___, 117 S.Ct. at 2043, that affect "special sovereignty interests" and cause "offense to [the state's] sovereign authority," *id.* at ___, 117 S.Ct. at 2040.
>
> *Elephant Butte Irrigation District v. Department of Interior*, 160 F.3d 602, 612 (10th Cir., 1998)

Thus, the above post-*ANR Pipeline* analysis by the Tenth Circuit holds that not every *Ex parte Young* claim that could have an impact on the state treasury, through its tax structure or otherwise, is *automatically* barred for invading "special state sovereign interests." In claiming that *ANR Pipeline requires* such a conclusion in every case involving state taxation, the State Officials are simply wrong and misread the view of the Tenth Circuit, as expressed in both *ANR Pipeline* and *Elephant Butte*. Instead, the test is "whether the relief will 'remedy future

rather than past wrongs' and 'requires only that officials conform their future actions to federal law'". See, e.g., *Green v. Mansour*, 474 U.S. 64, 69-71 (1985).

Far from diverging from the above analysis of the Tenth Circuit in *ANR Pipeline, supra,* as refined in *Elephant Butte, supra,* the Ninth Circuit in the present case engaged in just the same analysis and came to the same conclusion as did the Tenth Circuit in *Elephant Butte*:

> While we recognize that the power to impose a sales and use tax involves an important aspect of state sovereignty, we cannot overlook the fact that the claims here are brought by an Indian tribe. Indeed, in the context of state taxation of *tribes* there are preemption considerations and *competing* sovereignty interests, the merits of which are governed by a long line of cases. [cit.om.]. As we stated in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir., 1987):
>
> > In *Cabazon*, the Supreme Court stated that "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.
>
> *Id.* at 901 (citation omitted). The determination of whether the *Young* exception applies does not call for a balancing of one sovereign interest vis-à-vis another sovereign interest. Nonetheless, to assess the significance of the potential interference with California's sovereignty in this case, it is important to distinguish between the sovereign divestiture claim in *Coeur d'Alene* and the dispute here among sovereigns as to the reach of

> the taxing authority. Accordingly, although we express no view on the merits, we conclude that the Tribe's requested relief would not affect California's sovereignty interests to such "a degree fully as intrusive as almost any conceivable retroactive levy on funds in its Treasury." *Coeur d'Alene*, 521 U.S. at 287, 117 S.Ct. 2028, but would only insure that the state sales and use tax be applied by state officials in a manner consistent with federal law. Any effect the Tribe's requested relief would have on the state's tax collection activities does not rise to the level of the interference with state sovereignty that existed in *Coeur d'Alene*.
>
> *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048-1049 (9th Cir., 2000)

Therefore, as clarified by *Elephant Butte*, *ANR Pipeline* is entirely consistent with the present case. Both the Ninth and Tenth Circuits have determined that a claim which *involves* state taxation in some way does not *necessarily* invade a "special state sovereignty interest" regarding taxation. The pivotal factor is not whether state taxation is in some way involved, but whether the requested relief would be fully as intrusive as a levy on funds in a State's treasury, divestiture of sovereign authority over submerged lands, or other relief which transforms the case into one in truth against the state, rather than one aimed at requiring a state official to conform his or her prospective conduct to federal law.

Thus, there is no conflict at all between the Ninth Circuit in the instant case and the Tenth Circuit in *ANR*

Pipeline, when viewed in light of the Tenth Circuit's clarification of *ANR Pipeline* in *Elephant Butte*. Because there is no such conflict, no review by this Court is warranted on this basis.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED REGARDING AN ADEQUATE REMEDY AT LAW.

The State Officials note that the Tribe can pay the tax in question and sue in state court for a refund, thus providing a supposedly adequate remedy at law, thereby precluding an equitable remedy. Even were this true, it ignores this Court's jurisprudence that the existence of such an alternate remedy does not vitiate an otherwise available federal remedy under *Ex parte Young*. As recently as 1997, Justice Kennedy, in the lead opinion in *Idaho, supra*, in which five Justices concurred in the judgment, held that

> Even if there is a prompt and effective remedy in a state forum, a second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law. . . .
>
> *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 274 (1997)

While it is true that Parts II-B, II-C, and II-D of the lead opinion do speak of the availability of a state forum, only Justice Kennedy and the Chief of Justice subscribed to these portions of the lead opinion. The other seven Justices did not.

Therefore, this Court's most recent pronouncement on the question of whether the existence of a state forum makes a federal forum under *Ex parte Young* unavailable is that the federal forum remains available under *Ex parte Young*. In the present case, the Ninth Circuit adopted just this view:

> That there existed an alternate forum in state court in which the Tribe *could* raise its claims neither divested the district court of jurisdiction nor removed this case from the *Young* exception for Eleventh Amendment purposes. The Supreme Court's decision in *Coeur d'Alene*, although divided, supports this conclusion. . . . Justice Kennedy in the principal opinion . . . ultimately acknowledged, however, that "[e]ven if there is a prompt and effective remedy in a state forum, a second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law." *Id.* at 274, 117 S.Ct. 2028. Moreover, three other Justices indicated that the availability of a state forum is not a bar to the *Young* doctrine, stating that "[n]ot only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but *we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims.*" *Id.* at 292, 117 S.Ct. 2028 (O'Connor, J., concurring in part) (emphasis added [by Ninth Circuit]) and characterized the principal opinion as "ultimately conced[ing]" that "in more recent cases *Young* has been applied '[e]ven if there is a prompt and effective remedy in a state forum.' " *Id.*, at 293,

117 S.Ct. 2028 (quoting the principal opinion at 274).

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1049-1050 (9th Cir., 2000)

The Ninth Circuit thus did no more than follow this Court's teaching on this point. Therefore, this case presents no substantial federal question regarding the vitality of *Ex parte Young* when a state forum also exists.

CONCLUSION

For the reasons noted above, Respondents, the Agua Caliente Band of Cahuilla Indians and the Agua Caliente Tribal Corporation, urge the Court to deny the petition for a writ of certiorari.

February 28, 2001

Respectfully submitted,

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